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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

GEORGE DEMAKAS, Plaintiff and Appellant, v. HOWARD GUILBAULT et al., Defendants and Respondents.	A137144 (Contra Costa County Super. Ct. No. C11-01344)

George Demakas sued Howard Guilbault, individually and doing business as Golden Bear Auto Leasing, Inc. (collectively respondents), on both contract and tort claims. Demakas voluntarily dismissed his complaint. Demakas appeals from the court's award of attorney fees to respondents. We agree with Demakas that Civil Code section 1717, subdivision (b)(2),[1] precludes an award of attorney fees for respondents' defense of contractual claims and that the attorney fees provision at issue is not broad enough to cover tort claims. Therefore, we reverse the order awarding attorney fees.

I. FACTUAL and PROCEDURAL BACKGROUND

In June 2011, Demakas filed his complaint against respondents alleging causes of action for breach of contract, rescission, declaratory relief, and an accounting. Demakas also pled three causes of action for fraud, alleging intentional misrepresentation, negligent misrepresentation, and suppression of fact. Demakas alleged that, in 2006, he

[1] Unless otherwise noted, all further statutory references are to the Civil Code.

and Guilbault had entered into a written lease (the Lease) for use of Demakas's commercial property for an auto leasing business. The Lease provided for a base rent of $2,200 per month and was extended through April 2009. The Lease provided: "Lessee shall not voluntarily or by operation of law assign, transfer, mortgage, sublet, or otherwise transfer or encumber all or any part of Lessee's interest in the Lease or in the Premises, without Lessor's prior written consent . . . ." It also provided: "If either party or the broker(s) named herein bring *an action to enforce the terms hereof or declare rights hereunder*, the prevailing party in any such action, trial, or appeal thereon, shall be entitled to his reasonable attorneys' fees to be paid by the losing party as fixed by the court in the same or a separate suit, and *whether or not such action is pursued to decision or judgment*." (Italics added.)

Demakas's complaint alleged that, in February 2009, Guilbault represented that he was having financial difficulty and requested that the base rent be reduced by $500 per month. According to Demakas, Guilbault also concealed the fact that he had subleased the property and was collecting rent, in violation of the Lease. In reliance on these false representations, Demakas amended the Lease and agreed to reduce the rent to $1,700 per month.

Demakas contended that Guilbault had thereby breached the Lease and had engaged in fraud. In his rescission cause of action, Demakas alleged that he was entitled to rescind the Lease because he relied on Guilbault's false representations and concealment. In his accounting cause of action, Demakas asked for a calculation of the rent collected under the sublease and owed to Demakas. In his declaratory relief cause of action, Demakas sought a declaration that Guilbault had breached the Lease, that the Lease was rescinded, and that he was entitled to an accounting.

On June 4, 2012, after respondents answered the complaint and completed substantial discovery and mediation, Demakas filed a request for voluntary dismissal of the action without prejudice. The clerk entered the dismissal that same day.

On June 14, 2012, respondents filed a memorandum of costs, including attorney fees. On August 21, 2012, respondents filed a noticed motion for attorney fees and costs.

Demakas opposed the motion, arguing that respondents were barred by section 1717, subdivision (b)(2), from recovering attorney fees after a voluntary dismissal. He also contended that the motion was untimely and procedurally defective. Respondents filed a reply brief, which pointed out that the Lease provided for an award of attorney fees to the prevailing party irrespective of "whether or not [the] action [was] pursued to decision or judgment." The trial court issued a tentative ruling granting respondents' motion.

After oral argument, Demakas filed a surreply. Thereafter, the trial court confirmed its tentative ruling and granted the motion, awarding attorney fees and costs of $20,000.00. Demakas's request for a statement of decision was denied. Demakas filed a timely notice of appeal.

II. DISCUSSION

Demakas contends that the trial court's award of attorney fees in this case is inconsistent with section 1717, subdivision (b)(2), and the scope of the attorney fees provision of the Lease. Demakas also maintains that the trial court abused its discretion in disregarding respondents' noncompliance with the procedural requirements for claiming attorney fees and costs. However, we need not resolve the latter question because, even if respondents' motion for attorney fees was timely, we agree that the trial court erred in awarding attorney fees.[2]

"California follows the 'American rule,' under which each party to a lawsuit ordinarily must pay his or her own attorney fees. [Citations.]" (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 516.) "Under Code of Civil Procedure section 1032, subdivision (b), 'a prevailing party is entitled as a matter of right to recover costs in any action or proceeding . . . ,' *unless otherwise provided by statute*. ' "Prevailing party" ' includes 'a defendant in whose favor a dismissal is entered.' (Code Civ. Proc., § 1032, subd. (a)(4).) . . . [¶] Under Code of Civil Procedure section 1033.5, subdivision (a)(10),

[2] We also disregard Demakas's improper citation to unpublished opinions as precedential authority. (Cal. Rules of Court, rule 8.1115(a) [opinions not certified for publication "must not be cited or relied on by a court or a party in any other action"].)

the costs allowable under Code of Civil Procedure section 1032 include attorney fees 'only when the party entitled to costs has a legal basis, independent of the cost statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of attorney fees.' (*Santisas* [*v. Goodin* (1998)] 17 Cal.4th [599,] 606 [(*Santisas*)].)" (*Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, 484, italics added.) Thus, attorney fees are allowed as costs to the prevailing party when authorized by contract, statute, or other law. (Code Civ. Proc., §§ 1021, 1032, subds. (a)(4) & (b), 1033.5, subd. (a)(10); Civ. Code, § 1717.)

Here, we address whether the awarded attorney fees are authorized by contract. We review "a determination of the legal basis for an award of attorney fees de novo as a question of law. [Citaton.]" (*Sessions Payroll Management, Inc. v. Noble Construction Co*. (2000) 84 Cal.App.4th 671, 677; accord, *Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc., supra,* 158 Cal.App.4th at p. 484.)

"If a cause of action is 'on a contract,' and the contract provides that the prevailing party shall recover attorneys' fees incurred to enforce the contract, then attorneys' fees must be awarded on the contract claim in accordance with . . . section 1717. [Citation.]" (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 706 (*Exxess Electronixx*), fn. omitted.) Section 1717 provides, in relevant part: "(a) In any action *on a contract*, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶] . . . [¶] (b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section. [¶] (2) *Where an*

action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, *there shall be no prevailing party for purposes of this section.*" (Italics added.)

"[S]ection 1717 does not apply to tort claims; it determines which party, if any, is entitled to attorneys' fees on a *contract claim only*. [Citations.] As to tort claims, the question of whether to award attorneys' fees turns on the language of the contractual attorneys' fee provision, i.e., whether the party seeking fees has 'prevailed' within the meaning of the provision and whether the type of claim is within the scope of the provision. [Citation.] This distinction between contract and tort claims flows from the fact that a tort claim is not 'on a contract' and is therefore outside the ambit of section 1717. [Citations.]" (*Exxess Electronixx, supra,* 64 Cal.App.4th at p. 708.) Nevertheless, a broadly phrased contractual attorney fee provision may support an award to the prevailing party in a tort action. (*Ibid.*)

The parties disagree regarding whether "the action" is "on a contract" or based in tort. Both Demakas and respondents are misguided in their attempt to characterize the entire action as either based entirely on contract or tort. Instead, we look at the causes of action individually. (*Santisas, supra,* 17 Cal.4th at p. 615 ["[i]f an action asserts both contract and tort or other noncontract claims, section 1717 applies only to attorney fees incurred to litigate the contract claims"]; *Exxess Electronixx, supra,* 64 Cal.App.4th at pp. 707, 708.) "Whether an action is based on contract or tort depends upon the nature of the right sued upon, not the form of the pleading or relief demanded. If based on [a] breach of promise it is contractual; if based on [a] breach of a noncontractual duty it is tortious. [Citation.] If unclear the action will be considered based on contract rather than tort. [Citation.] [¶] In the final analysis we look to the pleading to determine the nature of plaintiff's claim." (*Arthur L. Sachs, Inc. v. City of Oceanside* (1984) 151 Cal.App.3d 315, 322; accord, *Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1178.)

Not just Demakas's breach of contract claim is "on a contract" for purposes of section 1717. In his claims for rescission, an accounting, and declaratory relief, Demakas also sought to have the trial court determine the parties' rights and duties under the Lease.

Such claims are also "on a contract." (*Exxess Electronixx, supra,* 64 Cal.App.4th at pp. 707–708, 710–711 [declaratory relief]; *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 549 [rescission]; *Brusso v. Running Springs Country Club* (1991) 228 Cal.App.3d 92, 107 [accounting]; *Hastings v. Matlock* (1985) 171 Cal.App.3d 826, 840–841 [rescission].) Accordingly, we conclude that section 1717 controls whether the trial court could properly award attorney fees for defending Demakas's breach of contract, rescission, accounting, and declaratory relief claims.

In their brief, respondents contend that they are not precluded from recovering attorney fees after a voluntary dismissal because the parties, in this case, contracted around section 1717, subdivision (b)(2). They rely on *Honey Baked Hams, Inc. v. Dickens* (1995) 37 Cal.App.4th 421, 424, 429, in which the Third District Court of Appeal held that, despite section 1717, subdivision (b)(2), a party was not foreclosed from seeking fees after voluntary dismissal when the contract provided for fees regardless of "whether or not [the] action is prosecuted to judgment." The Lease, here, may include similar language. But, our Supreme Court has directly addressed the issue and specifically disapproved of this approach.

In *Santisas, supra,* 17 Cal.4th 599, our Supreme Court attempted to reconcile section 1717, subdivision (b)(2), with Code of Civil Procedure sections 1032 and 1033.5. Focusing on language in section 1717, subdivision (a), requiring that the action be "on a contract," the court held: "[I]n voluntary pretrial dismissal cases, . . . section 1717 bars recovery of attorney fees incurred in defending contract claims, but . . . [does not] bar[] recovery of attorney fees incurred in defending tort or other noncontract claims." (*Santisas,* at pp. 602, 615.) The case before the *Santisas* court did not involve a contract that provided expressly for the recovery of attorney fees in the event of voluntary dismissal. (*Id.* at pp. 603, 617, 622.) But, in reaching the conclusion that it did, our Supreme Court anticipated that parties may attempt to contract around the default rule. The court observed: "[W]e construe subdivision (b)(2) of section 1717, which provides that '[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section,' *as*

overriding or nullifying conflicting contractual provisions, such as provisions expressly allowing recovery of attorney fees in the event of voluntary dismissal or defining 'prevailing party' as including parties in whose favor a dismissal has been entered. When a plaintiff files a complaint containing causes of action within the scope of section 1717 (that is, causes of action sounding in contract and based on a contract containing an attorney fee provision), and the plaintiff thereafter voluntarily dismisses the action, section 1717 bars the defendant from recovering attorney fees incurred in defending those causes of action, *even though the contract on its own terms authorizes recovery of those fees*." (*Id.* at p. 617, first italics added.)

The above quoted passage may be dicta. Nevertheless, "statements of the California Supreme Court should be considered persuasive even if properly characterized as dictum. [Citations.]" (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1147.) And, generally speaking, it is advisable for trial courts and intermediate appellate courts to follow Supreme Court dicta. (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1168–1169.) We see no reason to stray from that principle in this case.

In *Exxess Electronixx*, *supra*, 64 Cal.App.4th 698, the Second District Court of Appeal followed the reasoning of the *Santisas* court. *Exxess Electronixx* involved a tenant under a commercial lease that sued its broker for declaratory relief, constructive fraud, and breach of fiduciary duty, after discovering defects in the premises that allegedly should have been disclosed. (*Id* at pp. 702, 704.) After the action was settled and dismissed, the broker successfully moved for attorney fees, pursuant to a lease provision permitting prevailing-party attorney fees in " 'an action or proceeding to enforce the terms [of the lease] or declare rights hereunder . . . .' " (*Id.* at pp. 702, 704–705.)

With respect to the declaratory relief claim, the court explained: "[A]n award of attorneys' fees is not permitted where an action 'on a contract' has been dismissed as part of a settlement. (See *Santisas*[, *supra*,] 17 Cal.4th [at p. 617].) . . . [¶] We realize that the lease defined 'prevailing party' to include 'a Party or Broker who substantially obtains or

defeats the relief sought, as the case may be, *whether by compromise, settlement,* judgment, or the abandonment by the other Party or Broker of its claim or defense . . . .' (Italics added.) Thus, the lease contemplated an award of attorneys' fees to a cross-defendant who is dismissed as a result of a settlement. Nevertheless, the definition of 'prevailing party' in . . . section 1717 is mandatory and cannot be altered or avoided by contract. ([*Santisas,*] *supra,* 17 Cal.4th at pp. 615–617.) Contractual provisions that conflict with the 'prevailing party' definition under section 1717 are void. (17 Cal.4th at p. 617.)" (*Exxess Electronixx, supra,* 64 Cal.App.4th at p. 707.)

We follow *Santisas* and *Exxess Electronixx*. Because Demakas voluntarily dismissed his complaint, the trial court erred to the extent it awarded attorney fees in connection with the claims for breach of contract, declaratory relief, accounting, and rescission.[3]

Alternatively, respondents insist that the attorney fee award may be affirmed because "[t]he present case is properly characterized as a tort case . . . ." Demakas's fraud causes of action are not "on a contract" or an action to enforce contract provisions under section 1717 even though they are based on fraud arising out of a contract. (*Stout v. Turney* (1978) 22 Cal.3d 718, 730; *McKenzie v. Kaiser-Aetna* (1976) 55 Cal.App.3d 84, 89–90.) But, the primary question remains—does the attorney fees provision in the Lease entitle respondents to recover fees for defending tort claims? "The limitation of . . . section 1717, subdivision (b)(2)—precluding attorney's fees when a complaint is voluntarily dismissed—applies only to contract claims. (*Santisas, supra,* 17 Cal.4th at p. 622.) It does not apply to noncontract claims and thus does not preclude attorney's fees on noncontract claims where the contractual attorney's fees clause is broad enough to encompass noncontract claims. (*Ibid.*) . . . [¶] . . . [¶] Thus, . . . section 1717 does not bar recovery of attorney's fees for noncontract claims voluntarily dismissed by the plaintiff, as long as the attorney's fees clause is broad enough to encompass such

[3] Respondents appeared to largely concede as much at oral argument.

noncontract claims." (*Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, 1070–1071.)

Demakas asserts: "Even if the action in its entirety or the individual separate causes of action for [fraud] . . . were to be considered torts, nevertheless, the attorney fee clause in the lease is too narrow and not sufficiently broad to provide an independent basis for entitlement to attorney fees." Respondents, on the other hand, argue: "The case law demonstrates that the claims set forth in the Complaint, including the tort claims, fall squarely within the terms of the attorney's fee provision contained in . . . the [Lease]." This is a matter of contract interpretation. "When the facts are not in dispute and the right to recover attorney fees depends upon the interpretation of a contract and no extrinsic evidence is offered to interpret the contract, we review the ruling de novo. [Citation.]" (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1161 (*Casella*).)

In *Santisas, supra,* 17 Cal.4th at p. 608, the plaintiffs had alleged both a contract claim and various tort claims. The court concluded that the contractual attorney fees provision, which covered "claims 'arising out of the execution of th[e] agreement,' " was applicable to both tort and contract claims. (*Ibid.*) The court noted: "If a contractual attorney fee provision is phrased broadly enough, as this one is, it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims: '[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.' [Citation.]" (*Ibid.*)

Santisas and the authority cited by respondents are not helpful in construing the breadth of the attorney fee provision. (*Allstate Insurance Co. v. Loo* (1996) 46 Cal.App.4th 1794; *Lerner v. Ward* (1993) 13 Cal.App.4th 155; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338.) In two cases, the courts held that broadly-worded attorney fee provisions—applicable to actions between the parties that *arise* from the contract—encompass tort actions and are not limited to actions in contract. (*Lerner v. Ward,* at p. 160; *Xuereb v. Marcus & Millichap, Inc.*, at pp. 1340–1343.) Similarly, in

Allstate Insurance Co. v. Loo, at pages 1798–1799, the reviewing court concluded that the prevailing party was entitled to recover attorney fees with respect to tort claims. But, the lease, in that case, authorized an award of attorney fees to the prevailing party " '[i]n any legal action brought by either party to enforce the terms hereof *or relating to the demised premises* . . . .' " (*Id.* at p. 1797.)

Here, the fees provision is not nearly so broad. The Lease's attorney fee provision only authorizes an award of fees to the party prevailing on "an action to enforce the terms [of the Lease] or declare rights [thereunder] . . . ."

The court in *Exxess Electronixx* considered a similar provision and held that it applied to contract claims only, not to tort claims such as constructive fraud and breach of fiduciary duty. (*Exxess Electronixx, supra*, 64 Cal.App.4th at pp. 708–709.) The court stated: "[T]he question of whether [the broker] is entitled to attorneys' fees on those claims is governed by the language of the fee provision in the lease. (See [*Santisas,*] *supra*, 17 Cal.4th at pp. 602, 608–609, 617, 619.) [¶] . . . [¶] As our Supreme Court has indicated, where a lease authorizes the award of attorneys' fees in an action to ' " 'enforce any . . . provision . . . of this [contract],' " ' tort claims are not covered. [Citation.]" (*Exxess Electronixx,* at pp. 708–709.) Because "Exxess's tort claims were premised on a duty that arose without regard to the terms of the lease and before the lease existed[,] . . . Exxess's pursuit of the tort claims did not seek to 'declare rights []under' the lease." (*Id.* at p. 711, fn. omitted.)

Similar conclusions have been reached by other reviewing courts. In *Casella, supra,* 157 Cal.App.4th 1127, the Fourth District Court of Appeal interpreted a similarly narrow attorney fee provision and concluded that the plaintiff's tort claims, for wrongful termination in violation of public policy, fraud, and violation of the Labor Code, "do not seek to enforce the [contract]" and were thereby not eligible for an award of attorney fees. (*Id.* at pp. 1161–1162.)

Here, just as in *Exxess Electronixx, supra*, 64 Cal.App.4th at page 709, the language of the attorney fees provision allowed for recovery of fees only in actions "to enforce the terms [of the Lease] or declare rights [thereunder]." After first asserting that

the action is based entirely on tort, respondents then raise an inconsistent argument. Specifically, they contend: "There can be no reasonable dispute that Demakas'[s] Complaint sought to 'enforce the terms' of the [Lease] and to 'declare rights' thereunder. The Complaint's tort claims, including the fourth cause of action for fraud, were premised on allegations that '[Guilbault] concealed the fact and/or failed to reveal the fact that he was subletting and collecting rent from one or more entities in violation of section of the [Lease]." The intentional misrepresentation and negligent misrepresentation causes of action were based on Demakas's allegation that "[d]uring the time of negotiation of a third amendment to the [Lease], Guilbault [mis]represented to [Demakas] that Guilbault was having financial problems and requested that the base rent for the [p]roperty be reduced by $500 per month." Demakas's suppression of fact cause of action was based on allegations that Guilbault failed to reveal the fact that he was subletting and collecting rent. It is true that the Lease required respondents to obtain Demakas's written consent before subleasing the property. The Lease also provided that discovery of any materially false financial statement would constitute a default.

But, a distinction has been made between fraud actions in which the plaintiff seeks rescission of a contract and fraud actions in which the plaintiff seeks money damages. Fraud actions seeking rescission are "on a contract." (*Super 7 Motel Associates v. Wang, supra,* 16 Cal.App.4th at p. 549.) If monetary damages are sought, the fraud action is not on the contract; it is in derogation of it. (*Ibid.*; *Walters v. Marler* (1978) 83 Cal.App.3d 1, 16, 27–28, disapproved on other grounds by *Gray v. Don Miller & Associates, Inc*. (1984) 35 Cal.3d 498, 507.) Demakas did not frame his fraud causes of action as breach of a contractual promise or seek rescission. Instead, Demakas sought monetary damages, including punitive damages. Thus, it is clear that the fraud claims are not "on" the Lease. In any event, to the extent that Demakas's fraud claims are, in fact, premised on respondents' duties under the Lease, this is ultimately of no assistance to respondents because recovery of fees for defending contractual claims is barred by section 1717, subdivision (b)(2).

Because Demakas's tort claims did not seek "to enforce the terms [of the Lease] or declare rights [thereunder]," respondents have shown no entitlement to prevailing-party attorney fees incurred in the defense of such tort claims. Respondents cannot distinguish *Exxess Electronixx* on the ground that the contract and tort claims, in this case, are inextricably intermingled. Respondents cannot recover fees for defending the contract claims because such fees are barred by section 1717, subdivision (b)(2).

The Lease's attorney fee provision is not broad enough to authorize fees incurred in the defense of tort claims. And, section 1717, subdivision (b)(2), precludes an award of attorney fees for fees incurred in connection with Demakas's contract claims. The trial court's award of attorney fees must be reversed. Accordingly, we need not address respondents' suggestion that they are entitled to a further award of attorney fees on appeal.

III. DISPOSITION

The award of attorney fees is reversed. The trial court is directed to enter a new order awarding respondents only their costs without attorney fees. Each side shall bear its own costs on appeal.

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Bruiniers, J.

We concur:

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Simons, Acting P. J.

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Needham, J.